United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1104

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1104

UNITED STATES OF AMERICA
APPELLEE

v.

WALTER B. FREDERICK, JR.

and

REUBEN McCRARY
APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF APPELLANTS

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CITATIONS

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Silverthorne Lumber Co. v. *United States*, 251 U.S. 385
Spinelli v. *United States*, 393 U.S. 410 (1969)
United States v. *Suarez*, 380 F.2d 713 (2nd Cir. 1967)
Whitely v. *Warden*, 401 U.S. 560 (1971)
Wong Sun v. *United States*, 371 U.S. 471 (1962)

STATEMENT OF THE CASE

This is an appeal from rulings denying a Motion to Suppress Evidence and a Motion to Suppress Testimony filed on behalf of the Appellant Walter B. Frederick, Jr. These Motions were denied by the Honorable M. Joseph Blumenfeld in a written Memorandum of Decision dated January 2, 1974 (App. pp. 23-28).

The Appellant was charged (See Indictment, App. pp. 12-13) with three other defendants with willfully and knowingly keeping in his possession and concealing certain falsely made, forged, counterfeited or altered obligations and securities of the United States in violation of 18 U.S.C. §472 and 2 and with conspiring to do same in violation of 18 U.S.C. §371.

The Appellant filed a Motion to Suppress and a Motion to Suppress Testimony on September 10, 1973 (App. pp. 15-19) both of which Motions were denied by Judge Blumenfeld as stated above.

The Co-defendant Julian Taylor entered a plea of guilty to Count One on September 30, 1974. He was sentenced by Judge Blumenfeld on February 18, 1975 to three years imprisonment, execution suspended, and was placed on probation for three years with a condition of probation being that he make every reasonable effort to obtain psychiatric help.

The Co-defendant Marlon Eubank McLennan entered a guilty plea to Count One on November 11, 1974. He was sentenced by Judge Blumenfeld on February 3, 1975 to a term of one year in prison under the terms of the Youthful Offender Act, execution suspended, and was placed on probation for two years.

The Appellant and Co-defendant Reuben McCrary went to trial before the Honorable M. Joseph Blumenfeld and a jury on November 12, 1974. That trial terminated in a mistrial on November 15, 1974 because the jurors were unable to agree on a verdict.

The Appellant and the Co-defendant Reuben McCrary again went to trial on January 22, 1975, before the Honorable T. Emmett Clarie and a jury. This jury returned verdicts of guilty against both defendants on both Counts on January 24, 1975.

The Co-defendants Taylor and McLennan testified for the Government at both trials. The evidence and testimony which were the subject of the Appellant's Motions to Suppress, were introduced by the Government at both trials over the Appellant's objection.

The Appellant was sentenced by Judge Clarie on March 10, 1975 to a term of two years imprisonment on each Count, to run concurrently.

A timely Notice of Appeal was filed on March 18, 1975. (App. p. 14)

QUESTION PRESENTED

1. Whether The District Court Erred In Denying Appellant's Motions To Suppress Claiming That The Warrant Was Issued Without Probable Cause And That The Incriminating Statement Allegedly Made By The Appellant Was The Fruit Of An Illegal Search.

STATEMENT OF FACTS

Late in the evening of January 18, 1973 Special Agent Dewey Santacroce of the FBI received a message from his dispatcher to call a certain individual subsequently identified as the Co-defendant Julian Taylor. Agent Santacroce called Taylor and was instructed to proceed to his house. Accompanied by Special Agent Ludwig, Santacroce met with the Informant at his home, arriving there sometime before midnight. According to the testimony, Taylor insisted upon remaining in the dark, was armed with at least two guns and a butcher knife, was "belligerent" and possibly intoxicated and acted "strange or different." (App. pp. 33, 35, 36)

Taylor stated that he was in possession of $1,000,000.00 worth of stolen United States savings bonds which he offered to sell to the Government for $1,800.00. Taylor surrendered one bond to Agent Santacroce so that he could verify it as one of those stolen from the Connecticut State Comptroller's office. The Agents advised Taylor that they would check to see if the Government was interested in purchasing the bonds and would get back to him.

The following day, Agent Santacroce checked with NCIC and determined that the bond turned over to him by Taylor had in fact been stolen. Santacroce subsequently met with Agent John J. McCarthy of the Secret Service and members of the Connecticut State Police Department to arrange for acquiring the other bonds from Taylor. At this meeting, Santacroce advised McCarthy and the State Police of Taylor's bizarre behavior on the previous night and of the fact that he had been heavily armed. At the meeting it was decided that Santa croce would advise Taylor that he had a Government Agent interested in acquiring the bonds, and a buy would be set up between McCarthy and Taylor. Later that day Santacroce contacted Taylor by telephone to arrange a meeting between him and McCarthy. Taylor hedged about having $1,000,000.00 worth of bonds and subsequently admitted that he had lied and did not, in fact, have that amount of bonds to sell. Notwithstanding this revelation, a meeting was set up for later that evening again, at Taylor's insistence, after dark.

When Agents McCarthy, Santacroce and Ludwig arrived, Taylor's home was in darkness except for one light. The Agents were instructed to sit in the light while Taylor remained in the darkness. Taylor turned nineteen (19) additional bonds over to McCarthy and advised him that he had observed other bonds on January 17, 1973 at 172 Tower Avenue. Based upon this information Agent McCarthy and Trooper Richard Raposa of the Connecticut State Police Department that same

evening applied to Judge Ewing for a warrant to search 172 Tower Avenue, the home of Walter B. Frederick, Jr. (App. pp. 20-22)

Agent Santacroce testified that he had never used Taylor as an informant prior to January 18, 1973. Agent McCarthy testified that he had not known of the theft of the bonds prior to January 19, 1973, had never known Taylor prior to that day and had never used him as an informant before. He further testified that he did know of the Informant's prior criminal record and had been told by Agent Santacroce of Taylor's bizarre behavior and the fact that he had lied about the $1,000,000.00 worth of bonds. He did not, however, make these facts known to Judge Ewing. Trooper Raposa testified that at the time he applied to Judge Ewing for the Warrant he had never even met the Informant but had only seen a mug shot of him and had no first-hand knowledge of any of the events of January 18 or 19.

Based upon the Affidavit of Raposa and McCarthy, Judge Ewing issued a search warrant which was executed at approximately 9:00 P.M. on January 19, 1973. The searchers discovered some stolen bonds in Frederick's house and, after their discovery, Frederick was placed under arrest by Trooper Raposa. Upon being confronted with the bonds Frederick is claimed to have stated: "If all of the bonds are not there I will account for them next week". (App. p. 29) Defendant moved to suppress the bonds and the statement allegedly made by Frederick as evidence, which Motions were denied.

ARGUMENT

a. The Affidavit Failed To Disclose To Judge Ewing The True State Of Facts Within The Officer's Knowledge.

It is permissible, in a proper case, for a Defendant to attack the truth of assertions in an Affidavit submitted to obtain a search warrant. See, *United States* v. *Dunnings,* 425 F.2d, 836, 840 (2nd. Cir. 1969), Cert. denied 397 U.S. 1002 (1970); *United States* v. *Suarez,* 380 F.2d 713 (2nd. Cir. 1967); *United States* v. *Ramos,* 380 F.2d 717 (2nd. Cir. 1967); *United States* v. *Freeman,* 358 F.2d 459, 463 n.4.

The United States Supreme Court, although not deciding the issue, has assumed for purposes of one of its decisions that such an attack can properly be made. *Rugendorg* v. *United States,* 376 U.S. 528, 531-32 (1964). In *United States* v. *Halsey,* 257, F. Supp. 1002 (S.D.N.Y. 1966), the Court discussed at length the arguments for and against allowing defendants to attack such Affidavits. Its conclusion was that attacks should be permitted where there is an initial showing of falsehood or other impropriety which affects the integrity of the Affidavit. See generally, Mascolo, *"Impeaching the Credibility of Affidavits for Search Warrants,"* 44 C.B.J. (1970). Defendant submits that the reliability of Taylor in the instant case is essential to a finding of probable cause. The police had no first-hand knowledge linking Frederick to the stolen bonds and therefore only Taylor's story could provide this link. Judge Ewing's finding that the Informant was reliable was, therefore, essential to the establishment of probable cause. If, as Defendant claims, this finding was not justifiable because the true state of facts was not made known to Judge Ewing, then the warrant was improperly issued and the Motion to Suppress should have been granted.

Probable cause exists when the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. *Brinegar* v. *United States,* 338 U.S. 160, 185-86 (1949). The Supreme Court has consistently ruled that the constitutional requirements of probable cause in the issuance of a search warrant demand that the issuing magistrate be supplied with sufficient information to support an independent judgment that probable cause exists. *Whitely* v. *Warden,* 401 U.S. 560 (1971); *Spinelli* v. *United States,* 393 U.S. 410 (1969). Although this information may be based on hearsay and need not reflect the personal observation of the affiants, the magistrate must at least be informed of the following:

1. Some of the underlying circumstances from which the Informant concluded that the contraband was where he claimed it was, and

2. Some of the underlying circumstances from which the officer concluded that the Informant was credible or his information reliable. *Aguilar* v. *Texas,* 378 U.S. 108, 114 (1963).

Implicit in the second phase of the *Aguilar* test is the corollary proposition that if the police have information which would cast doubt upon the reliability or credibility of the Informant, this information must also be made known to the magistrate. How otherwise can the magistrate make the independent determination of whether or not Taylor's story should be believed? This is especially true where, as here, the police choose to rely solely upon the statement of an informant to establish probable cause. See, *United States* v. *Caniesco,* 470 F.2d 1224, 1231 (2nd. Cir. 1972). The Affidavit here fails to make mention of the critical facts which were within the knowledge of Agents Santacroce and McCarthy and Trooper Raposa, which had a bearing on the credibility and reliability of the Informant. The affiants did not mention that Taylor had previously lied to Agent Santacroce concerning the number of bonds in his possession nor did they advise Judge Ewing of his criminal record, his unusual behavior on the prior night or that he was intoxicated. Had Judge Ewing been fully informed of the circumstances surrounding the meeting at which the Agents obtained their information from Taylor, it is doubtful that he would have regarded it as "reasonably trustworthy" within the meaning of Brinegar. He, therefore, would not, or should not, have found probable cause and would have refused to issue the warrant.

The Affidavit in this case is not only misleading by virtue of the information omitted by the police officers, but also by reason of the way certain information was presented to the Judge. It is clear that the affiants deliberately phrased their Affidavit in such a way as to lend to the Informant's story an aura of reliability which it clearly did not deserve. For example, in Paragraph 6 the Informant is referred to as a "Government Informant". (App. p. 21) This was obviously an attempt to give Judge Ewing the impression that he had provided the police with information on prior occasions or in prior investigations. The term "Government Informant" has, over the years, been used to describe individuals who, on a continuing basis, supply tips to the police. The Supreme Court has recognized that police are often entitled to rely upon information which comes from individuals who have supplied them with correct tips in the past. See, *Jones* v. *United States,*

362 U.S. 257; *Draper* v. *United States,* 358 U.S. 307. Acceptance of the tipster's word is based on the concept that where an informant has a history of past veracity, there is good reason to believe that current information is reliable. See, *State* v. *Jackson,* 162 Conn. 440, 294 A.2d 517 (1972) (Dissenting Opinion). Here the so-called Government Informant had established no prior history of reliability. The only information supplied by him in the past was the fact that the one bond he turned over to Santacroce on January 18 was stolen from the State Comptroller's office. This meager bit of information surely does not qualify him as a Government Informant as that term has come to be understood and as Judge Ewing undoubtedly assumed him to be.

The Affidavit is phrased in other respects in such a manner as to make it misleading. Paragraph 7 would seem to indicate that the affiants had received information from the Informant on more than one occasion and that he was known to the police. However, as the testimony disclosed, Agent McCarthy had only met the individual on January 19 and Trooper Raposa had never even met with or talked to him. As all of the Agents admitted, they had no information on Taylor's background. For all they knew, he could have been a convicted perjurer, a psychopathic liar or an individual who bore a grudge against the Defendant Frederick.[1] However, notwithstanding this complete lack of information concerning his background, they chose to fully accept his story and to draft an application for a warrant based thereon, in terms calculated to disguise their total lack of familiarity with him.

Looking at the totality of the circumstances it is clear that on the evening of January 19, 1973 the police did not have probable cause to believe that stolen bonds would be found at 172 Tower Avenue. They had no first-hand knowledge linking the bonds to those premises. Neither did they have reasonably trustworthy information to that effect. At most they had the bare word of an unknown informant whose behavior can best be described as bizarre and who had, in the span of less than twenty-four hours, given two inconsistent statements concerning the location of the stolen bonds. This is clearly not the type of information upon which reasonably prudent men act in the conduct of their own affairs and is therefore insufficient to justify the finding of probable cause. For this reason, the warrant should not have been issued and the Defendant's Motion to Suppress the physical evidence found on his premises should have been granted.

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[1] Taylor did, in fact, admit at both trials that he had lied under oath to the Grand Jury concerning Frederick's involvement in this case.

b. The Application, On Its Face, Fails To Establish Probable Cause.

The Affidavit here clearly fails to pass the two-pronged test enunciated by the Supreme Court in *Aguilar* v. *Texas,* 378 U.S. 108 (1963). The only information given concerning the reliability of the Informant is the conclusory allegation in Paragraph 7 which states that information had been received through this Informant in the past which was proved to be reliable and factual. No details concerning this information were supplied by the officers. The magistrate was not informed as to when it was given, on how many occasions, the type of information it was or whether it ever resulted in any arrests or convictions. In other words, there were no underlying circumstances set forth whereby the issuing magistrate could independently test the police officers' assertion that this informant was reliable.

This removed a vital function from the deliberation of a "detached and neutral magistrate" and renders the Affidavit and ensuing warrant fatally defective. *Aguilar* v. *Texas,* supra; *State* v. *Allen,* 155 Conn. 385, 391 (1967); see also, *United States ex rel DeNegris* v. *Menser,* 247 F. Supp. 826 (D. Conn. 1965). The bare statement that the informant had supplied reliable information in the past is not sufficient to satisfy the *Aguilar* test where the Affidavit consists entirely of hearsay information obtained from or through that informant. *United States* v. *Caniesco,* 470 F.2d 1224, 1231 (2nd Cir. 1972). The Courts, in such a situation, invariably require the affiants to provide some information against which the statement of the informant can be tested.

Thus, in *United States* v. *Dunnings,* 425 F.2d 836 (2nd Cir. 1969), the Affidavit contained the following facts:

1. The informant had supplied reliable and accurate information on approximately 20 occasions over the prior four years;

2. The informant had been present with Dunnings in his apartment;

3. Dunnings had admitted recently obtaining a quantity of heroin from out of town;

4. The affiant had checked Defendant's record and found a prior narcotic conviction;

5. Defendant had been mentioned in nine other investigations as a source of heroin;

6. Information had been received from five other reliable informants that the Defendant was recently out of town and had just returned.

7. All informants had stated that the Defendant was in the business of selling heroin.

From these facts the Court held that the magistrate could properly find that the informant was credible, not only because details concerning his prior reliability were supplied, but also because the information supplied was, to some extent, corroborated by independent police investigation.

A similar situation existed in *United States* v. *Suarez,* 380 F.2d 713 (2nd Cir. 1967). There the Court upheld a warrant where the police described their anonymous informant as having provided information on at least 100 occasions over the prior year and a half which information had proved to be extremely reliable and accurate. The informant had told the affiant that he had been at the Defendant's apartment and had observed what appeared to be approximately ½ kilogram of heroin. The affiant then conducted a surveillance of the Defendant's apartment which surveillance showed Defendant entering and leaving on a number of occasions and a suspiciously heavy amount of traffic in and out of the apartment complex, even though only two apartments were occupied.

Two critical factors are present in *Dunnings* and *Suarez* and in virtually every other decision wherein the police rely primarily on the tip of an unidentified informant to establish probable cause. These factors are:

1. Details are provided concerning the prior reliability of the informant; and

2. The information supplied is, to some extent, corroborated by independent police investigation.

This gathering of corroborative evidence has been held to be essential by the Supreme Court in such cases as *Whitely* v. *Warden,* supra; *Draper* v. *United States,* 358 U.S. 307 (1959) and *Chambers* v. *Maroney* 399 U.S. 42 (1970). The case of the *United States* v. *Harris,* 403 U.S. 573 (1971) marks the farthest that the Supreme Court has gone in sustaining a finding on probable cause based almost entirely on the statements of an unnamed informant. However, even in that case, the police had other information that corroborated the informant's statement, such as *Harris'* reputation for over four years as a trafficker in illegal liquors and that another law enforcement officer had located a sizeable stash of illegal whiskey in a house under Harris' control.

It is precisely this corroborative evidence that is missing from the instant case. The police apparently had no information other than the informant's statement linking Frederick to the stolen bonds. There

was no allegation that Frederick had a record or a reputation for engaging in illegal activity of the sort described in the application. See, *e.g., United States* v. *Harris,* supra. Nor is there any statement that police surveillance or other investigation in any way verified the informant's statements. See, *e.g., Draper* v. *United States,* supra. Rather, the police chose to rely solely on the informant's tip to establish probable cause to search the Frederick premises. In such a case the Court must carefully scrutinize the statement of the informant to determine the proper weight to be given it, *Spinelli* v. *United States,* 393 U.S. at 415, and must apply the Aguilar test with "full rigor." *United States* v. *Caniesco,* 470 F.2d 1224, 1231 (2nd Cir. 1972). Applying that test to the "meager report" contained in the instant application it is clear that the information contained there is not "one which in common experience may be recognized as having been obtained in a reliable way." *Spinelli* v. *United States,* 393 U.S. at 417-418. The Informant here provided no details that would permit the magistrate to determine that he was not fabricating his report out of "whole cloth". *Draper* v. *United States,* supra. He merely states that he went to 172 Tower Avenue on a given day, observed some bonds there, took 20 of them into his possession and turned them over to the police. He provides no description of the Frederick premises; no details concerning where on the premises he observed the bonds; no details as to how he came to obtain 20 of the bonds; who was present at the time or how many bonds he observed. He does not tell if Frederick was present or if so, was he alone or with others. Details such as these, had they been supplied by the Informant, would have given Judge Ewing some basis upon which to independently judge his credibility. Absent such details, however, the Informant's statement can be given little if any weight and it must therefore fail the test of *Aguilar.*

The lack of specificity in the Informant's statement gives rise to another reason for finding a lack of probable cause. From all that Judge Ewing knew from the statement provided him, the bonds could have been located at 172 Tower Avenue on January 17 strictly on a temporary basis. The Informant may have observed them under circumstances which would lead a reasonable and prudent person to believe that the bonds were on the Frederick premises for only a short period of time. They may have been seen outside of the house, e.g., in a car parked on the premises, or on the person of an individual other than a resident of that address. There was no indication that presence of the bonds at 172 Tower Avenue was part of a history of similar

activity conducted on the premises. See, *United States* v. *Harris*, supra. n.1. In other words, there was no specific averment in the Affidavit which Judge Ewing could find that on the date the warrant was issued (January 19) the bonds were likely to still be found on the Frederick premises. See *Rosencranz* v. *United States*, 356 F.2d 310 (1st Cir. 1966).

The Government will undoubtedly rely upon *United States* v. *Harris* 403 U.S. 573 (1971) to provide a basis for crediting Taylor's story. In that case the Court pointed to the fact that the Informant had made statements against his penal interest and this was a factor to be considered in weighing his credibility. An analysis of Taylor's statements here, however, establishes that the statement of January 19, wherein the Defendant Frederick is implicated, is more exculpatory than inculpatory in nature. On January 18 he had admitted to possessing $1,000,000.00 worth of stolen Government bonds. This was clearly a statement against his penal interest. In the statement of January 19, however, the Informant stated that not he, but Frederick, had possession of the bonds. Applying the rationale of *Harris* to these two inconsistent statements, the police should have believed the January 18 statement and disbelieved the subsequent one.

c. The Admissions Made By Frederick Were Fruits Of The Illegal Search And Therefore Should Have Been Suppressed.

After the police found the allegedly stolen bonds and confronted Frederick with them it is claimed that he made certain admissions and incriminating statement. If the Court finds that the search was illegal for any of the reasons hereinabove stated, it must also find that the statement made by Frederick were the fruits of that search and are also subject to suppression. The essence of a rule of law forbidding the acquisition of evidence in an illegal manner is not merely that the evidence so acquired shall not be used before the Court, but that it shall not be used at all. *Fahy* v. *Connecticut,* 375 U.S. 85 (1963). The Constitution prohibits not only the direct, but also the indirect, use of evidence obtained as the result of an illegal search and seizure. *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385. An unlawful search taints all the evidence obtained as a direct result thereof, as well as all leads uncovered by the search. *United States* v. *Paroutian,* 299 F.2d 486, 489 (2nd Cir. 1962). In *Fahy* v. *Connecticut,* supra. the Supreme Court reversed the Defendant's conviction because the trial court had admitted into evidence certain admissions and a written confession that *Fahy* had made after having been confronted with evidence seized illegally by the police. See also, *Wong Sun* v. *United States,* 371 U.S. 471 (1962).

The statements made by Frederick in the instant case were made immediately after he was confronted by the police with the evidence allegedly found in his home. If the search of the home was illegal then the statements obtained from Frederick were the fruits of this illegal search and must also be suppressed.

CONCLUSION

For all the foregoing reasons, the judgment of the District Court should be reversed, and the case remanded for a new trial.

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REUBEN McCRARY

APPELLANTS

CERTIFICATION OF SERVICE

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